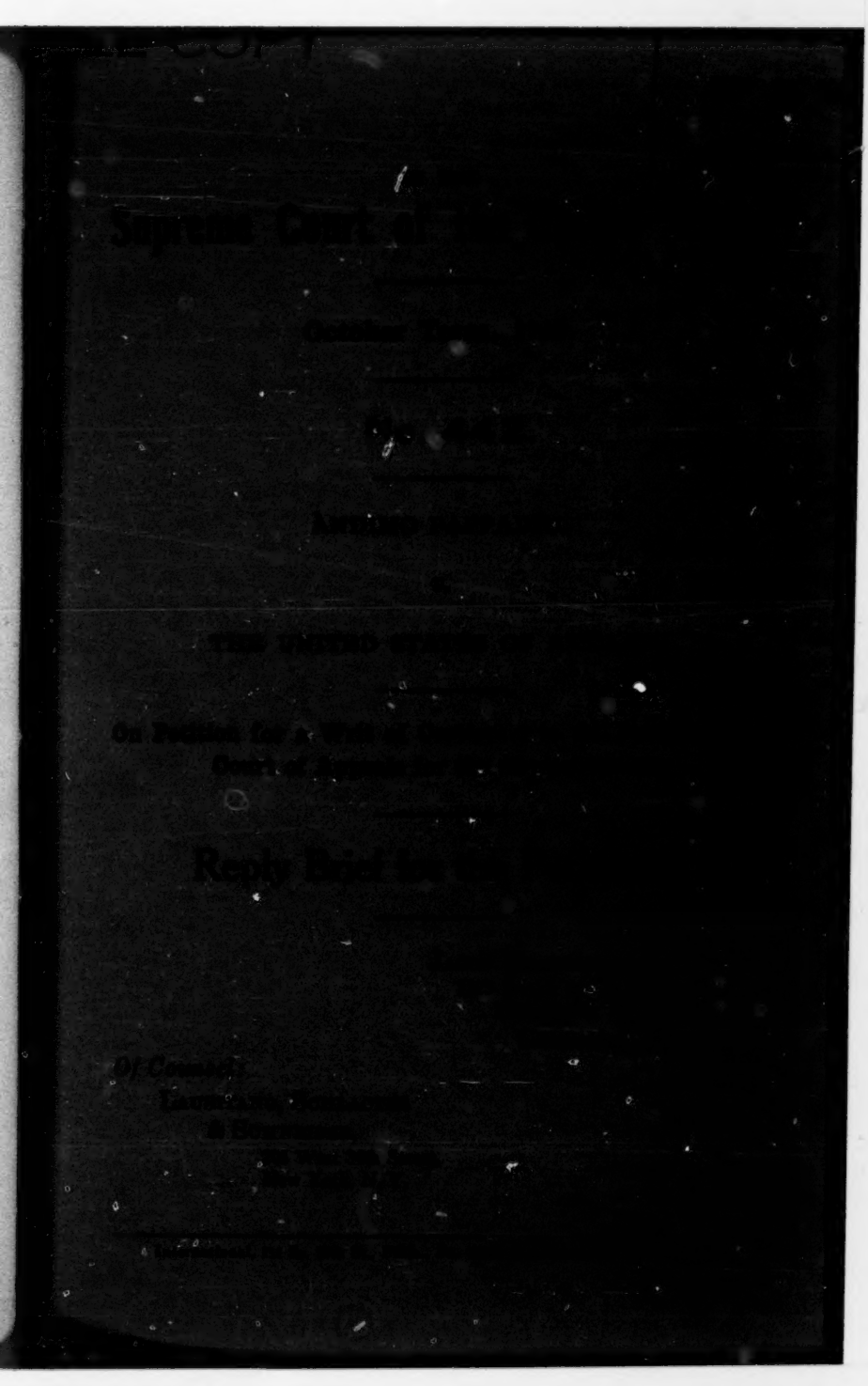

TABLE OF CITATIONS.

IN THE

Supreme Court of the United States.

No. 442

ANDIMO PAPPADIO,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

Petitioner's principal arguments are set forth in full in his petition for certiorari. This reply brief is devoted to answering a few points raised by respondent and to rebutting arguments which misconstrue our position.

1. Respondent has chosen to avoid meeting one of the most fundamental questions raised by petitioner by the artless device of grossly misstating petitioner's position. In the largest sense, this cases poses the issue of what limits, if any, exist upon the power of the Government to compel testimony through the means of an immunity statute. Resisting the efforts to force him to testify in this case, petitioner contended that the compulsion violated several basic constitutional rights. Specifically he challenged the coercion as violative of the Fifth Amendment guarantee that a defendant cannot be compelled to take the stand in a criminal case, the First Amendment privilege of silence and freedom of association, and the Sixth Amendment

right to effective assistance of counsel. One looks in vain in respondent's memorandum for any argument directed to these fundamental questions.

Worse than the failure of respondent to speak to the constitutional issues is the attempt to leave these questions out of respondent's statement of the facts of the case. The memorandum, on page 4, purports to state in full the objections raised by petitioner in refusing to answer. The statement omits all reference to the constitutionally based objection. *Tacit satis laudant:* their silence is praise enough.

2. The fifth question presented by the petition for certiorari is:

> "Whether a grand jury witness, having unconditionally testified to non-involvement with a group allegedly engaged in illegal narcotics activity, having thus contradicted under oath evidence said to be in the hands of the Government, thereby becoming subject to the peril of a perjury prosecution, has a privilege under the Fifth Amendment to refuse to answer questions about his relationship with the alleged leader of that group."

The Government responds:

> "An immunity statute is not rendered constitutionally defective merely because the witness may be prosecuted for perjury committed while testifying under a grant of immunity. . . . There is no merit, therefore, to petitioner's argument that his testimony denying allegations made by government counsel (such as petitioner's membership in the Lucchese group) might become the basis for a perjury prosecution if he testified further to conflicting facts." (Pp. 6-7)

The crudity of this gross distortion of the question presented is beyond explanation.

Ever so subtly, the respondent sets the stage for the transformation by the reference to "allegations made by government counsel" rather than the sworn testimony said to be in the Government's possession. A conflict between petitioner's testimony and the "allegations made by government counsel" is of no particular significance. A conflict between petitioner's testimony, and the sworn testimony previously obtained by the Government is radically different. The latter, which is the case at hand, presents a frontal conflict of testimony under oath. Out of that clash, a perjury prosecution is not a fanciful fear.

Protecting himself against that possibility, petitioner argued that he had a privilege against self-incrimination. He maintained that he could not be compelled to testify to contacts he had had with the supposed leader of the illegal group in which he denied participation. Any testimony petitioner might give, even to the most innocent of contacts, could be construed as ambiguous or worse, thereby tending to establish the truth of the sworn testimony in the Government's possession, which would in turn lead to a conclusion that petitioner's testimony had been false and perjurious.

The Government's distortion completely ignores the sworn testimony given against petitioner before he was compelled to testify. Rather the Government would have it appear that petitioner, having said one thing under oath, was afraid that he might say something in direct conflict later; the former and latter statements, if inconsistent, would show that one must be false.[1] This contention is a product of the imagination of Government counsel and has no relationship to the question raised by petitioner, whose plight is a real one.

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1. Thus the Government memorandum, in the sentence following that quoted in the text above, refers to "the possibility that one statement under oath might conflict with another statement made in the course of the same testimony" and ascribes this as the basis of petitioner's argument (P. 7).

Petitioner feared further inquiry, not because it would conflict with *his previous testimony,* but because it might be circumstantially supportive of the primary conflicting evidence already in the possession of the Government. Without that primary evidence, which the Government conveniently chooses to ignore, the subordinate evidence would have nothing to support. Government counsel said they had the primary evidence under oath. Petitioner flatly and unequivocally denied the truth of that evidence. Surely, there is a serious question whether he can be compelled further to strengthen the Government's case against him, notwithstanding the Fifth Amendment privilege against self-incrimination.

3. Petitioner strongly maintained that he could not be compelled to testify in this federal grand jury investigation of illegal narcotics activities because he was the defendant in an outstanding indictment charging him with a violation of the federal narcotics statute. Petitioner cited, and relied upon, the opinion of two Justices in *Piemonte v. United States,* 367 U. S. 556, 565 (1961), where far less egregious circumstances existed: the indictment was not returned until after the defendant there had refused to testify, and the indictment had been dismissed before this Court's decision. The Government memorandum purports to distinguish the present case from *Piemonte* on the ground that there, unlike this case, "the indictment related to the same subject matter about which the defendant was asked questions" (P. 6). There is not a shred of evidence to support the Government's pronouncement. Illegal narcotics activities underlay the indictment and were the subject of the grand jury investigation.

4. The Brief for the United States in *Harris v. United States,* No. 6, October Term 1965, states:

> "In the contempt area, . . . there is no reason to fear that excessive uncorrectible punishments will be

> imposed by district courts; the exercise of discretion may be carefully policed by courts of appeals and by this Court." (P. 65)

It is respectfully submitted that petitioner's case shows, contrary to the Government argument, that there is indeed reason to fear excessive *uncorrected* punishments. It strains credulity to believe that appellate review can or will serve as an adequate safeguard to prevent harsh punishments for contempt. Certainly this Court cannot be converted into a body that is regularly available to review sentences in contempt cases. Nor can the courts of appeals be relied upon to mitigate too severe impositions. This case is illustrative. Petitioner answered virtually all the questions put to him. His refusal to answer five was explained on a variety of weighty constitutional and statutory grounds. Nonetheless, the trial court saw fit to sentence him to two years in jail, and the Court of Appeals affirmed. Excessive, uncorrected sentences will continue to occur unless this Court acts to set limits upon the uncontrolled and arbitrary discretion of the lower courts. At a minimum, exercising the function posited by the Government, this Court should consider the excessive nature of the penalty in this case.

CONCLUSION.

For the foregoing reasons and those stated in our opening brief, we respectfully submit that the judgment of the court of appeals should be reversed.

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